Draft
10/31/11

MICHIGAN SENATE JUDICIARY COMMITTEE
HEARING ON SENATE BILL 778
TUESDAY, NOVEMBER 1ST, 2011

1. Richard J. Jaskowski, Carey and Jaskowski, PLLC, Representative of the Higgins Lake Property Owners Association

2. The Higgins Lake Property Owners Association ("HLPOA") strongly supports Senate Bill 778

3. Senate Bill 778 would simply codify the longstanding Michigan appellate court rulings regarding prohibitions on private dockage, overnight boat mooring, and boat hoists at public road ends at lakes. Such structures and activities are clearly unlawful under *Jacobs v Lyon Twp (after remand)*, 199 Mich App 667; 502 NW2d 382 (1993) and *Higgins Lake Property Owners Assn v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003). In addition to those cases, the following are additional Michigan appellate court decisions that indicate that public road ends in Michigan cannot be utilized for private dockage, permanent or overnight boat moorage, boat hoists, and similar uses or activities:

   - *Higgins Lake Shores Lakefront Property Owners v Lyon Twp*, Michigan Court of Appeals decision issued December 2, 2008; 2008 WL 5076595 (Docket No. 278894)

   - *Magician Lake Homeowners Assn, Inc v Keeler Twp Bd of Trustees*, Michigan Court of Appeals decision issued July 31, 2008; 2008 WL 2938650 (Docket No. 278469)

   - *Higgins Lake Property Owners Assn v Gerrish Twp*, Michigan Court of Appeals decision issued October 20, 2005; 2005 WL 2727702 (Docket Nos. 262494, 262533, and 262717)

   - *Kleiner v Wachowicz*, Michigan Court of Appeals decision issued February 12, 2004; 2004 WL 258259 (Docket Nos. 244053, 244328)

   - *Douglas v Harting*, Michigan Court of Appeals decision issued December 18, 2008; 2008 WL 5273425 (Docket No. 277892)

4. There is also an extensive formal Michigan Attorney General Opinion that discusses both permissible and impermissible uses of public road ends in Michigan.

5. Why is Senate Bill 778 needed? There are many reasons as follows:

   (a) The widespread unlawful activities occurring at public road ends throughout Michigan are intolerable and breed contempt for the law.

   (b) The relatively narrow public road ends make lousy marinas.

   (c) Private individuals are appropriating public property for their own exclusive use.

(d) The Court of Appeals has invited a legislative solutionUnlawful activities at public road ends "crowd out" or effectively preclude lawful uses such as easy water access, swimming, fishing, etc.

(e) Road ends that are cluttered up with speedboats, personal watercraft, and other high speed boats create safety hazards.

(f) There is widespread conflict with adjoining riparian property owners.

6. Senate Bill 778 will not take away anyone's rights. Rather, it will simply codify the existing Michigan common law, make enforcement efforts easier, and allow public road ends at lakes to be safely utilized for the uses originally intended. Enactment of this bill will save hundreds of thousands of dollars in litigation fees and remove needless lawsuits from the trial courts and appellate courts of this State.

WHERE THE WATER MEETS THE ROAD
Access to the water from a public road

William L. Carey

Introduction

As has been frequently observed, Michigan is a water wonderland. Not only is Michigan the Great Lakes State, it also has more than 11,000 inland lakes and countless miles of rivers and streams. It is difficult to identify another state where water-related recreation opportunities are so varied and esteemed by its citizenry. The lake frontage surrounding Michigan's big inland lakes (Torch, Higgins, Houghton, Burt, Mullet, Crystal and Walloon among them) began to be developed between 1900 and 1925. The virgin pine forests of northern Michigan had been logged and developers from Detroit and Chicago, already familiar with Michigan's spectacular lakes and streams, began to acquire large tracts of land from the logging companies and then subdivided the large tracts into smaller parcels. Often the subdividing was done via the Plat Act.[1]

The typical turn of the century northern Michigan lakefront subdivision was laid out on a plat with a series of blocks. Each block was then divided into rows of lots and bordered by streets. Additionally, many of these plats also were designed with a lakeside boulevard running the length of the plat. The streets separating the blocks almost invariably terminated at the water's edge. This article will review the current status of the law regarding the extent to which water access opportunities are provided to the public via platted streets and boulevards.

Public Roads and the Platting Process

As noted above, the shorelines of many of Michigan's large inland lakes were developed

at the turn of the 20th century with the use of the Plat Act. The platting process was subject to governmental approval and, as part of the platting process, a developer was required to provide a means of legal access to each lot within the subdivision. Access to subdivision lots was usually created via a dedication of streets to "the public." A dedication is, in essence, a grant by the developer to a public authority that creates a public way.[2] When the dedication is accepted by a public authority, the street subject to the dedication comes under the jurisdiction of the public authority.[3] In the case of lakefront subdivisions, the dedicated roads not only provided access to the platted lots, but also to the adjoining body of water. Since the dedicated roads were usually laid out perpendicular to the shoreline, these roads are often referred to as "down roads." The terminus point of a down road is usually called a "road end." The dedicated down roads, after coming under public jurisdiction, were available for all members of the public to use. The public's use almost always included a right to access the water's surface from the road end. Beyond accessing the water's surface, there has been much litigation over what other uses the public may engage in at the road ends.

Public Access via Public Road Ends

Since at least 1882, the Michigan courts have determined that a platted public road that ends at a navigable body of water may be used by the public to gain access to the water's surface.[4] Once a member of the public lawfully gains access to the water's surface, he or she is free to navigate the entire water surface under the doctrine of navigational servitude.[5] Members of the public with lawful access to the water's surface may use the water for boating, fishing and swimming, including temporary anchorage, so long as the anchorage is related to boating, fishing or swimming. [6]

In *Jacobs v Lyon Twp*, the developer of the Lyon Manor Subdivision dedicated the roads in the plat to the use of the public.[7] The subdivision, which was dedicated in 1902, fronts on the south side of Higgins Lake. The platted roads in the subdivision have a width of sixty-six feet. Many of the dedicated streets in the plat ended at the water. In 1987, Lyon Township enacted a zoning ordinance allowing all members of the public to moor boats, maintain docks, picnic, sunbathe and lounge at the road ends. The ordinance did not regulate the number of users of a road end or the number of boats allowed to be moored there. The Lyon Township zoning ordinance was challenged by owners of lots in Lyon Manor whose cottages or homes were adjacent to the road ends. They argued that the public's use of the road ends as parks and marinas created a nuisance and devalued their property. More specifically, the plaintiffs argued that the road ends were never intended by the plattor to be used for anything more than road purposes. The Michigan Court of Appeals ultimately determined that the developer of Lyon Manor Subdivision did not intend the roads in the plat to be used for recreational activities. Accordingly, the Court ruled that the portions of the township ordinance which authorized picnicking, sunbathing, lounging and boat mooring were invalid.

Lyon Manor Subdivision is one of thirteen lakefront subdivisions located on the shore of Higgins Lake. The other subdivisions around Higgins Lake were all also platted between 1900 - 1925. Each of these subdivisions also had numerous road ends. After *Jacob*, a series of twelve lawsuits were filed which sought a declaratory ruling that the roads in these subdivisions could not be lawfully used as marinas or parks. After trial the cases were appealed to the Court of Appeals. At the Court of Appeals, the cases were consolidated into two groups with separate opinions, one of which was published: *Higgins Lake Property Owners Ass'n v Gerrish Twp.*[8]

In the published decision, the *Higgins Lake* Court undertook an exhaustive analysis of the law related to platted public roads and the allowable uses of the road ends by the public. Following closely the *Jacobs* analysis, the Court ruled that the platted roads could not be used for water-recreational activities. The Court recognized that a common public dock at a road end was within the allowed uses, reasoning, as other courts have, that a dock is a navigational aid to the water surface. The *Higgins Lake* panel, like the *Jacobs* panel, ruled that the legal presumption is that a road terminating at the water's edge provides public access to the water, but the burden rests on the party attempting to show that more than mere access was intended. Accordingly the Court ruled that absent evidence of the dedicator's intent to the contrary, recreational activities such as sunbathing, picnicking and lounging are not lawful. The Court also precluded the non-temporary mooring of water craft as being beyond the dedicator's intent.

Interestingly neither *Jacobs* nor *Higgins Lake* addressed the issue of who owns the riparian bottom lands as extended from the road terminus. Each court reasoned that a determination of actual ownership of the subaqueous land was unnecessary to reach a resolution of the public's usage rights. While the *Jacobs* and *Higgins Lake* panels dealt with public roads, the analysis used in the decisions is equally applicable to private roads and easements. It is the scope of the dedication, as determined by the dedicator's intent, which dictates allowable uses. A legal presumption is imposed preventing general recreational uses, unless a contrary intent can be established.

Public Access via Public Lateral Roads

The creation of a wide scenic boulevard running along the lakeshore is a common feature of plats on inland lakes in Michigan. These boulevards, often referred to as "lateral roads" by

the courts, have widths as great as 100 feet. When these lateral roads run the entire shoreline of a subdivision, none of the lots in the subdivision actually touch the water's edge. The lots which are separated from the water by the lateral roads are commonly called "front tier" lots.

With regard to public lateral roads, two important legal issues present themselves. First, what recreational activities can the public engage in on the boulevard? Second, who controls the riparian land adjacent to the lateral road? Each issue has now been definitely resolved by the Michigan Supreme Court in the matter of *2000 Baum Family Trust v Babel.*[10]

The Baum Trust and other plaintiff were owners of lots facing Lake Charlevoix, but separated from the water by a road that was dedicated to public use in a subdivision plat that was recorded pursuant to the Plat Act. Plaintiffs brought an action in the Charlevoix Circuit Court against William Babel and other back-lot owners, the Charlevoix County Road Commission and Charlevoix Township. Plaintiffs moved for partial summary disposition against the road commission only, contending that plaintiffs held riparian rights. The trial court ruled that plaintiffs had no riparian rights and the Court of Appeals affirmed, holding that the plain and unambiguous language of the Plat Act granted the public fee title to a dedicated roadway for the use and purposes stated in the dedication, and that the road commission was in "no way" limited in the type of use it could make of the road. The Michigan Supreme Court granted plaintiffs' application for leave to appeal.

Consistent with longstanding rules of property in this state, the Michigan Supreme Court held that the property interest conveyed by a statutory dedication under the Plat Act in a public road that runs parallel to a body of water or watercourse did not divest the front tier property owners of their riparian rights.[11] The Court stated that no Michigan decision has ever held that

a dedication of a base fee in a parallel road conveys riparian rights to the receiving government entity, and every Michigan decision that has addressed this issue has concluded that riparian rights rest with the front-lot owners.

Regarding the types of activities that the public could engage in upon the lateral road and adjacent shoreline, the Michigan Supreme Court held that all dedications of land to public use must be considered with reference to the use for which they are intended. In Michigan, riparian rights have never been considered among such rights. This is in direct contrast to down roads: public ways that terminate at the edge of navigable waters have been deemed at common law to provide public access to the water. However, no decision in this state has ever held that a dedication of a road that runs parallel to the water conveys riparian rights. This is because the former type of road can provide public access to the water consistently with the primary purpose of a roadway, which is to provide public passage for all, and the latter cannot. Accordingly, the Supreme Court held that the jurisdiction of the road commission did not include riparian rights to the road at issue, precluding the road commission from granting public access to the water, as such uses are incompatible with the underlying dedication. Lateral roads may not be used for any recreational purpose and may not be used as water access points. Further, the owners of land adjacent to and separated from the water by lateral roads hold riparian rights in the adjacent water front.

Summary

Hundreds of platted public road ends throughout the state provide the public with legal and meaningful access to navigable inland waters. However, these access points cannot be used as parks or marinas, absent a contrary intent expressed in the dedication. Lakeside boulevards

or lateral roads provide the public with a scenic view, but generally access to the adjacent waters is not allowed.

Fast Facts

Use of public roads as a means to access the water presents unique challenges to the owners of the land adjacent to these roads.

Down roads generally provide public access to the water, but not for the purpose of sunbathing, picnicking or lounging.

Lateral roads generally provide the public with only a scenic view of the water.

Author Biography

William Carey of Grayling, Michigan, is a senior partner in the firm of Carey & Jaskowski, P.L.L.C., where he concentrates his practice in real estate law with an emphasis on the Land Division Act, water rights and environmental protection. Mr. Carey has presented water law and plat cases to the Michigan Supreme Court on five separate occasions, including most recently *2000 Baum Family Trust v Babel.*

---

1. 1887 PA 309, the Plat Act of 1887. The current version of this act is now known as the Michigan Land Division Act, MCL 560.101, *et seq*.
2. Prior to 1931 this was either the township or village. In 1931, the McNitt Act, 1931 PA 130, was enacted. The McNitt Act created county road commissions and a countywide system of local roads. Townships and villages then transferred jurisdiction of their local roads to the county road commissions.
3. *Kraus v Michigan Dep't of Transportation,* 451 Mich 420; 547 NW2d 870 (1996).
4. *Backus v Detroit,* 49 Mich 110; 13 NW 380 (1882).
5. *Bott v Nat Recourses Comm,* 415 Mich 45; 327 NW2d 838 (1982).
6. *Thies v Howland,* 424 Mich 282; 380 NW2d 463 (1985).
7. *Jacobs v Lyon Twp (After Remand),* 199 Mich App 667; 502 NW2d 382 (1993).
8. *Higgins Lake Property Owners Assoc v Gerrish Twp,* 255 Mich App 83; 662 NW2d 387 (2003). The related, unpublished opinion, is available through Westlaw: 2003 WL

22462312.

10. *2000 Baum Family Trust v Babel*, __ Mich __; __ NW2d __; 2010 WL 5393474.

11. *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), vacated in part, 404 Mich 89 (1978); *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); *Thies, supra*.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30212
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

April 18, 2011

Mr. Tyrone Sanders
Public Affairs Associates, Inc.
120 North Washington Square, Ste. 1050
Lansing, MI 48933

Dear Mr. Sanders:

It is my understanding that you have inquired regarding the continuing validity of OAG, 2007-2008, No 7211, p 105 (January 30, 2008), issued to then Representative John Stakoe, during the prior administration.

Due to its subject matter, staff in the Environment, Natural Resources, and Agriculture Division were asked to review the 2008 opinion. Their review reveals that no intervening changes in the law have occurred. Thus, this office's legal conclusion remains the same as in the previous opinion, which is attached for your convenience.

Thank you for bringing this matter to our attention. I hope this information is helpful to you.

Sincerely yours,

Richard A. Bandstra
Chief Legal Counsel

Att.

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

PLATS: The scope of permissible "public uses" of platted roads ending at the shore of a lake

DEDICATIONS:

CONST 1963, ART 3, § 7:

REAL PROPERTY:

While the Legislature has the authority to modify the law, any legislative modification of the judicially established rules of property law that have shaped the rights and expectations of property owners regarding the meaning of "public use" in the context of platted roads ending at the shore of a lake has the potential to impact existing property rights and would be subject to the constitutional protections against the taking of property without due process and just compensation.

Opinion No. 7211

January 30, 2008

Honorable John Stakoe
State Representative
The Capitol
Lansing, MI 48909

You have asked whether the Legislature has the power "to revisit" determinations made by the Michigan Court of Appeals in court cases concerning the scope of permissible "public uses" of roads that end at the shore of a lake in platted subdivisions. The specific cases underlying your question are *Jacobs v Lyon Twp* (*Jacobs I*), 181 Mich App 386, 391; 448 NW2d 861 (1989), *Jacobs v Lyon Twp* (After Rem) (*Jacobs II*), 199 Mich App 667; 502 NW2d 382 (1993), and *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003), all of which involved evidentiary and legal determinations regarding the scope of permissible uses at particular road ends on Higgins Lake.

Before addressing your question, some background information about plats and the law regarding the dedication of land in plats for public use is helpful.

In the two *Jacobs* cases and the *Higgins Lake Property Owners Ass'n* case, the property at issue fronted on Higgins Lake and had been subdivided and platted, or mapped, by the proprietors of the property in accordance with state statutes that allowed the creation of such plats. "Proprietor" is the term used to describe the owner of the lands that are subdivided by a plat. See, e.g., the Land Division Act, 1967 PA 288, MCL 560.101 *et seq*, at section 102(*o*), MCL 560.102(*o*). In addition to creating lots, the proprietors of the plats involved in these cases designated roads on the plats to provide access to the lots and to the shore of Higgins Lake. The roads ran approximately perpendicular to the shore of Higgins Lake and ended there. *Jacobs I*, 181 Mich at 387; *Higgins Lake Property Owners Ass'n*, 255 Mich App at 88.

As part of the platting process, the proprietors set forth words of dedication on the plats, thereby defining who could use certain common areas on the plats, such as roads, alleys, and parks, and how those lands could be used. As to the plats involved in the *Jacobs I* and *Higgins Lake Property Owners Ass'n* cases, the words of dedication simply indicated that the roads in the plats were for "public use." *Jacobs I*, 181 Mich at 389; *Higgins Lake Property Owners Ass'n*, 255 Mich App at 89.

A dedication of land in a plat "for public use" not only describes who may use the land and how it may be used but also serves as an offer of a gift of that land for public use. *Wayne County v Miller*, 31 Mich 447, 448-449 (1875). Under the laws that governed the creation of plats at the time the plats in the *Jacobs I* and *Higgins Lake Property Owners Ass'n* cases were recorded, lands dedicated by plats were deemed to be held in trust by the local unit of government having jurisdiction over that land. The Plat Act, 1839 PA 91, as amended by 1887 PA 309, stated:

> The maps so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporated city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated, and for no other use or purposes whatever.

This former provision of the then Plat Act is similar to that found currently in section 253(1) and (2) of the Land Division Act, MCL 560.253(1)(2), which states:

> (1) When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other.
>
> (2) The land intended for the streets, alleys, commons, parks or other public uses as designated on the plat shall be held by the municipality in which the plat is situated in trust to and for such uses and purposes.[1]

Under the statute by which the plats had been created and case law dealing with dedication, it has become well established that where land has been given for a public use, the permissible uses to which that property may be put are governed by the intent of the person who dedicated that land. In the case of a plat, the intent of the dedicator is determined from the language used in the dedication and the surrounding circumstances. *Jacobs II,* 199 Mich App at 672. The intent of any donor is inherently fact-specific and must be determined on a case-by-case basis according to the available evidence. Where the plat simply states that the roads are for public use and are shown on the plat to end at a body of water, the courts have consistently applied the principles reiterated in the *Jacobs* cases regarding the scope of permissible uses of those roads.

In addition to dedications to the public through the recording of a plat, there may also be "dedications" of land for the exclusive private use of persons designated in the dedication. See *Martin v Beldean*, 469 Mich 541, 546-548; 677 NW2d 312 (2004).

Regardless of whether the land has been dedicated for public use or for private use by the recording of the plat, private rights arise in the lot owners who purchase their land in reliance on the words of the plat. As noted in *Pulcifer v Bishop*, 246 Mich 579, 582-583; 225 NW 3 (1929):

> But it is also the rule in this and other States that the platting and sale of lots constitute a dedication of streets, etc., delineated on the plat, as between the grantors and the purchasers from them.
>
> It is said in Dillon on Municipal Corporations (5th Ed.), § 1090:
>
> "In this connection it must be kept in view that the platting and sale create certain rights in the grantees of the original owner, which, as between the grantor and the grantee, are irrevocable in their nature.
>
> * * *
>
> "But other decisions recognize a *clearly defined distinction* between the rights acquired by the *public* through dedication effected by platting and sale, and the *private rights* acquired by the grantees by virtue of the grant or covenant contained in a deed which refers to a plat, or bounds the property upon a street through the grantor's lands. These decisions adopt the view that where lands are platted and sales are made with reference to the plat, the acts of the owner in themselves merely create private rights in the grantees entitling the grantees to the use of the streets and ways laid down on the plat or referred to in the conveyance. But these rights are purely in the nature of private rights founded upon a grant or covenant, and no public rights attach to such streets or lands until there has been an express or implied acceptance of the dedication, evidenced either by general public user, or by the acts of the public authorities. In this view, the making of the plat and the sale of lands with reference thereto are merely evidence of an intent to dedicate, which like every other common law dedication, to be made complete and carried into effect so as to create public rights, must be accepted and acted upon by the public." Citing *Grandville v. Jenison*, 84 Mich. 54. [Emphasis in original.]

Thus, private rights arise in dedicated or reserved areas of the plat upon the sale of lots within the plat. It is well established that a purchaser of property in a recorded plat receives not only the interest as described in a deed to the property but also whatever rights are described in the plat. *Nelson v Roscommon County Rd Comm*, 117 Mich App 125, 132; 323 NW2d 621 (1982). The Court in *Nelson* further explained that lot owners in plats have inherent rights to use the streets laid down in the plat and that those rights are in the nature of easements. The corollary to this principle is that owners within a plat have rights in limiting the use of such areas to their dedicated purposes such as occurred in both *Jacobs* cases and the *Higgins Lake Property Owners Ass'n* case. See also *West*

Michigan Park Ass'n, n 1 *supra*, and cases cited therein.

Jacobs II is regarded as the leading case concerning rights in dedicated streets ending at water, summarized by the Court as follows:

> Publicly dedicated streets that terminate at the edge of navigable waters are generally deemed to provide public access to the water. *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985);[2] *McCardel v Smolen*, 404 Mich 89, 96; 273 NW2d 3(1978); *Backus v Detroit*, 49 Mich 110; 13 NW 380 (1882). The members of the public who are entitled to access to navigable waters have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing, and swimming. An incident of the public's right of navigation is the right to anchor boats temporarily. *Thies, supra* at 288. The right of a municipality to build a wharf or dock at the end of a street terminating at the edge of navigable waters is based upon the presumption that the platter intended to give access to the water and permit the building of structures to aid in that access.[3] *Thies, supra* at 296. The extent to which the right of public access includes the right to erect a dock or boat hoists or the right to sunbathe and lounge at the road end depends on the scope of the dedication. *McCardel, supra* at 97; *Thom v Rasmussen*, 136 Mich App 608, 612; 358 NW2d 569 (1984). The intent of the dedicator is to be determined from the language used in the dedication and the surrounding circumstances. *Thies, supra* at 293; *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928). [*Jacobs II*, 199 Mich App at 671-672.]

---

[2] In *Thies*, the Court ruled that public ways that terminate at the edge of a navigable body of water are treated differently from those that run parallel to the shore. *Thies*, 424, *supra* at 295.

[3] However, it is not to be inferred that the municipality has the right to appropriate the road ends to any use inconsistent with the dedication. *Backus, supra* at 120.

The *Jacobs II* Court held that, where platted streets are dedicated "for the use of the public," a nonexclusive public dock could be erected at the road end, but individuals could not erect boat hoists there or sunbathe or lounge. 199 Mich App at 670, 673.

In the *Jacobs I* case, the Court of Appeals had held that the construction of a public boat dock at the shore of a dedicated, platted road was within the scope of the dedicated public use and that the use of surface waters adjoining the road end for swimming, wading, fishing, and boating and to temporarily anchor boats were also within the scope of the dedicated public use. *Jacobs I*, 181 Mich App at 391. But the Court also held that the "construction of boat hoists, seasonal boat storage and the use of road-ends for lounging and picnicking *exceed the scope and intent of the dedication* of property for use as streets." *Id.* (Emphasis added.) *Jacobs II* continued these holdings in the subsequent decision on appeal after remand.

Returning to your question regarding whether the Legislature may modify a rule of property law that has been developed regarding the dedication of platted road ends upon which persons have relied when acquiring interests in platted lands, it appears that you are asking whether the Legislature may retrospectively broaden the parameters of what constitutes permissible "public use" when these words have been used in a plat dedication. This issue was addressed in *Jacobs I*. Lyon Township enacted an ordinance that the Court described as follows:

> In 1987, apparently in response to the ongoing shoreline conflict, defendant township enacted Ordinance 31 which purports to govern public water and land-related activity at lake road-ends. In short, the ordinance provides for the erection of no more than one nonexclusive private dock at each road-end which must be maintained for public use, prohibits overnight mooring, prohibits permanent mooring posts, permits the erection of boat hoists, prohibits parking on the roadway, and prohibits the dry storage of boats, boat hoists, docks, et cetera on the land at the road-end. The ordinance provides that, except as otherwise prohibited, the general public may use the road-ends for "lounging, picnicking, swimming, fishing and boating, provided such activities do not create a safety hazard, cause unreasonable congestion, interfere with the intended use, or otherwise disturb the peace." [181 Mich App at 388-389.]

The lot owners in the plat under review in *Jacobs I* sued the township, claiming that the uses and activities permitted by the ordinance exceeded those contemplated by the dedication of the streets for public use. The Court agreed that certain uses and activities were beyond the scope of the dedication and ruled that the provisions of the ordinance allowing such activities "must be stricken":

> In this case, we believe that the construction of boat hoists, seasonal boat storage and the use of road-ends for lounging and picnicking exceed the scope and intent of the dedication of property for use as streets. Those activities are not necessary to either the use and maintenance of the streets, or to provide public access to the water. As our Supreme Court noted in *McCardel* [*v Smolen*, 404 Mich 89; 273 NW2d 3 (1978)]:
>
> > Lounging and picnicking on this wide boulevard, activities which need not involve use of the water,

> are not riparian or littoral rights. We agree with the Court of Appeals that "[t]hose activities are in no way directly related to a true riparian use of the waters of Higgins Lake; even assuming that the defendants choose to lounge and picnic on the boulevard because of the lake's proximity. In that context, the only 'use' of the water is the enjoyment of its scenic presence." . . .
>
> The question whether the public has the right to enter and leave the water from the boulevard, like the question whether they may lounge and picnic on the boulevard, depends, rather, on the scope of the dedication. [404 Mich 97.]

> Plaintiffs also claim that the public beach and party activities on the road-ends created a nuisance and plaintiffs seek abatement of those activities. We need not review the trial court's ruling on plaintiffs' nuisance claim in light of our decision that the *portions of the ordinance permitting those activities beyond the scope of the dedication in this case must be stricken.* [181 Mich App at 391-392; emphasis added.]

In reaching its decision, the Court of Appeals noted the court decisions holding that road ends at lakes are presumed to be intended as a means of access to a lake, and that municipalities could erect docks at the road ends to facilitate public access to a lake or river. *Jacobs*, 181 Mich App at 390. But the Court went on to note that a municipality has no right to appropriate road ends to any use inconsistent with the dedication, citing *Backus v Detroit*, 49 Mich 110, 115; 13 NW 380 (1882).[2]

The decision in *Jacobs I* is also consistent with *Baldwin Manor, Inc v City of Birmingham*, 341 Mich 423, 428; 67 NW2d 812 (1954), where the Michigan Supreme Court held that the City of Birmingham was precluded from building a road through a park which, if built, would "make impossible, or at least impracticable, the use of parcels No 1 and No 2 for park purposes." The Court relied on the legal encyclopedia Corpus Juris Secundum (CJS) to summarize the law concerning government's ability to alter a dedication:

> Likewise, in 26 CJS, Dedication, § 65, pp 154, 155, it is said:
>
> "Except as appears below,[3] if a dedication is made for a specific or defined purpose, *neither the legislature*, a municipality or its successor, nor the general public *has any power to use the property for any other purpose than the one designated*, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication; and this rule is not affected by the fact that the changed use may be advantageous to the public. This can only be done under the right of eminent domain. On the other hand, the municipality cannot impose a more limited and restricted use than the dedication warrants." [341 Mich at 430-431; emphasis added.]

Similarly, statutory changes to property rights created by established rules of property law may not be applied retroactively if that would result in an adverse impact on those rights. In *Gorte v Transportation Dep't*, 202 Mich App 161, 167; 507 NW2d 797 (1993), the Court of Appeals held that a statute precluding a claim of adverse possession against the State did not apply to the plaintiff where application of the statute would result in abrogating or impairing the plaintiff's vested right. The Court of Appeals found that, because plaintiff's right had vested before the effective date of the statute, the plaintiff could successfully assert his claim of adverse possession against the State.

The Court's rulings in *Jacobs I* and *II* and *Higgins Lake* were based on over 100 years of common law precedent, and any alteration of the property interests identified in those decisions must, therefore, be considered in that context. The rights and expectations of property owners are legitimately grounded in long-standing recognition of those rights and expectations. See, e.g., *Bott v Natural Resources Comm*, 415 Mich 45; 327 NW2d 838 (1982). As discussed above, Michigan law prohibits marina-like operations, such as permanent boat mooring or hoists, and sunbathing and lounging, at road ends dedicated "for public use" unless such activities are authorized by the dedication. Thus, a statutory change allowing these activities at road ends in already existing plats could have an adverse impact upon the rights of the property owners within the plat, particularly those whose properties are situated next to these road ends.

Const 1963, art 3, § 7 provides that the "common law and the statute laws now in force . . . shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Thus, the Legislature has the ability to modify the law. *Rusinek v Schultz, Snyder, & Steele Lumber Co*, 411 Mich 502, 506-508; 309 NW2d 163 (1981). However, the Legislature is subject to constitutional limitations. Both the United States and Michigan Constitutions prohibit the taking of private property without just compensation and due process of law. US Const, Am V; Const 1963, art 10, § 2.

The Fifth Amendment of the United States Constitution provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." This prohibition is applied to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, B & Q R Co v Chicago*, 166 US 226, 234; 17 S Ct 581; 41 L Ed 979 (1897). Similarly, the Michigan Constitution provides:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a

> manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record. [Const 1963, art 10, § 2.]

Of course, whether any of these constitutional limitations would be implicated by a particular legislative action seeking to alter the meaning of "public use" is fact-dependent and cannot be answered in the abstract. Generally, however, when property dedicated for a particular purpose is appropriated for an entirely different purpose, this may afford grounds for a court action to enjoin the inconsistent use or secure compensation for the interference with valuable property rights. See *Ford v Detroit,* 273 Mich 449, 452; 263 NW 425 (1935). See also *Austin v VanHorn,* 245 Mich 344, 347; 222 NW 721 (1929); *Sanborn v McClean,* 233 Mich 227; 206 NW 496 (1925); and *Allen v Detroit,* 167 Mich 464, 469-470; 133 NW 317 (1911).

It is my opinion, therefore, that, while the Legislature has the authority to modify the law, any legislative modification of the judicially established rules of property law that have shaped the rights and expectations of property owners regarding the meaning of "public use" in the context of platted roads ending at the shore of a lake has the potential to impact existing property rights and would be subject to the constitutional protections against the taking of property without due process and just compensation.

MIKE COX
Attorney General

[1] The same or similar language first appeared in the territorial acts of March 12, 1821, and April 12, 1827, and continued in 1839 PA 91, the Plat Act of 1929, 1929 PA 172, and the Subdivision Control Act of 1967, 1967 PA 288, which is now called the Land Division Act. See *Kirchen v Remenga,* 291 Mich 94, 111; 288 NW 344 (1939), and *West Michigan Park Ass'n v Dep't of Conservation*, 2 Mich App 254, 262; 139 NW2d 758 (1966).

[2] A municipality has no proprietary interest in the dedicated areas. See *Village of Kalkaska v Shell Oil Co*, 433 Mich 348; 446 NW2d 91 (1989), and cases cited therein.

[3] It is not necessary to address the exceptions noted in 26 CJS § 65 to answer your question.
